93-15

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

DONALD NERO,

PETITIONER,

VS.

DONALD B. RICE, SECRETARY,
DEPARTMENT OF THE AIR FORCE;
UNITED STATES OF AMERICA,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

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DONALD NERO,

PETITIONER,

VS.

DONALD B. RICE, SECRETARY,
DEPARTMENT OF THE AIR FORCE;
UNITED STATES OF AMERICA,

RESPONDENTS.

QUESTIONS PRESENTED

1. Whether or not the appellate court misstated appellant's contentions on appeal, and whether or not the appellate court committed reversible error by relying upon "findings" that were clearly contra to those of the trial court.

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OPINIONS BELOW

The United States District Court for the Western District of Oklahoma granted summary judgment in favor of the United States on Nero's Federal Tort Claims Act allegations on June 6, 1991. That decision is not a part of this petition. After a bench trial on Nero's claims of discrimination, the district court entered judgment in favor of Donald Rice on December 12, 1991. (Appendix "A" and "B"). Nero was permitted an extension of time in which to file a notice of appeal by the district court and thereafter filed his notice of appeal on March 9, 1992 to the United States Court of Appeals for the Tenth Circuit. On February 3, 1993, the Appeals Court affirmed the decision of the District Court. (Appendix "C"). In so doing, the

Tenth Circuit Court of Appeals held that Nero had not provided the court with a transcript sufficient for a meaningful review of his case. Nero timely filed a petition for rehearing and moved the Court of Appeals for leave to file a supplemental appendix. The petition for rehearing and motion to supplement was denied by order dated March 30, 1993. (Appendix "D").

STATEMENT OF JURISDICTION

The dates of the judgments sought to be reviewed are February 3, 1993 and March 30, 1993. The court from which relief is sought is the United States Court of Appeals for the Tenth Circuit. This Court has jurisdiction pursuant to 28 United States Code § 1254.

STATUTORY PROVISIONS

The statutory regulations involved in this case are Rule 10 and 30 of the Federal Rules of Appellate Procedure and Rules 10 and 30, and their respective subdivisions, of the United States Court of Appeals For the Tenth Circuit Rules of Court (the "Local Rules" for the Tenth Circuit). The pertinent texts of each are set forth in Appendix "E" and "F" respectively.

STATEMENT OF THE CASE

The basis for federal jurisdiction in the court of first instance was a violation of 42 U.S.C. § 2000e et seq and 28 U.S.C. §§ 2671-2680.

Petitioner, Don Nero, Appellant below, Plaintiff at trial, (hereinafter referred to as "Nero" or "Petitioner") was employed by Defendant-Appellee-

Respondent, Donald B. Rice, Secretary of the Air Force ("Rice", "the Air Force" or "Respondent") as a preservation packer. Nero brought an action in the trial court which alleged he was not promoted to a supervisor's position based on his race.

Nero's argument on appeal was that since the trial court summarily rejected the Air Force's "business reason" for his non promotion, he should prevail as a matter of law.

In the appeal of his case, Nero submitted an appendix which included the relevant portions of the trial transcript, namely: (1) evidence of Nero's prima facie case; (2) evidence of the business reason for his non-promotion, and (3) evidence of pretext. Also Nero included findings which the

trial judge made at the close of all the evidence which conclusively established that the trial judge completely rejected the "legitimate business reason" offered by the Air Force. McDonnell Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973). Thereafter, the trial court refused to allow the introduction of further evidence by the Air Force in support of that reason and refused to allow the introduction of further evidence by Nero to show that the proffered reason was pretext.

Specifically, the Air Force stated that the reason that Nero was not promoted was that his name did not appear on a computer generated "computer profile" list. The Air Force reasoned, in effect, that since the computer itself was "color blind," Nero's non-promotion

could not be the result of race discrimination. To this contention and during the cross-examination of the Air Force's witness by Nero, the trial court responded in open court:

> THE COURT: We have spent an enormous amount of time on profiles. I'll be real candid with you, it hasn't made a lick of sense to my why we are involved in profiles. Now, I'm concerned about whether the man was discriminated against because of race. You can't blame what happened on a computer. In other words, if garbage goes in, garbage comes out. Something went in and something went out. We have spent five hours. I don't know what goes in. I don't believe you have presented any evidence to indicate to me what goes into the profile. You haven't presented any evidence as to why it shouldn't. I am not interested in profile. The fact that he didn't make a profile doesn't concern me the least bit. It is whether or not he was discriminated against because he is black or not. Now, let's quit wasting time on this stuff and get to the issues in this lawsuit. I have tried to be very patient but we have wasted an enormous amount of time. Now, let's go.

During the closing arguments the trial court made further comments

concerning the "legitimate business reason" proffered by the Air Force. In a diatribe with Mr. Drenan, the defense attorney, during the Air Force's closing arguments the trial court stated:

THE COURT: You've got to give me some reason, because I think I've got to be somewhat impressed, the fact that he's been there longer, his ratings are as far as I can tell equal to these others, and he's black. And he's put on some testimony and some evidence, including his own, that one of this supervisors was racially motivated in these matters and he was not promoted.

Now, give me some reason why he was not promoted that the evidence will support.

MR. DRENAN: Because having the skills as a packer are not necessarily the skills necessary to be a permanent supervisor and the skill coding that goes into the computer would have had some skills that Mr. Nero had as a packer.

THE COURT: Tell me what those are. I never do -- I couldn't get that from-- I tried to make some sense out of this testimony, but what kind of skills did they have that would allow them to be promoted and would not permit him to be promoted? You can't just say the computer spewed out something, because

that doesn't mean anything to me.

I do not believe we are victimized by computers. Computers do what we tell them to do. We might not always analyze and understand it, but if you put garbage in there, it comes out. That's the basic rule. So you can't hide behind a computer and say, Look, I don't know why the computer didn't choose him, but he didn't get chosen, therefore, we're not discriminatory. That won't work.

MR. DRENNEN: Yes, sir. That's not what we're saying. What we're saying is that those people's educational and prior work experience, because that's taken into consideration, prior qualifications, just not the qualifications.

THE COURT: I didn't hear any of those from the witness stand.

After further discourse with the defense counsel the trial court stated:

THE COURT: See, what you have got me on is that you say there is a whole bunch of factors that went into getting him on or off profile in this computer but nothing-- I listened in vain for a witness to say what are all of the things that would cause him to and what are the relevant things and so forth. I never did get anything.

After hearing all of the evidence the last remarks made by the trial judge to

the defense counsel were as follows:

THE COURT: I think his best shot is that he was a black; he was an employee with longevity; that his ratings were good; that he served as a temporary supervisor and his performance ratings were good and that three -- two or three white people, with ostensibly no better qualifications and less longevity, were promoted and he was not.

If you have anything to say about that, you might out to say that now, because I think that's his best shot. I'm not worried about whether he was loaned out or whether he was not. He hasn't tugged at me in any way in that regard. Just as the computer hasn't helped you any as far as I am concerned. If the computer is programmed so that it would reach a result that someone desired, that's the result that it will reach. It doesn't give you an excuse to elevate three white women with no better qualifications than a black unless you can explain some good reason why that happened.

The trial court entered his order of findings nearly six months after the trial in this matter and held:

"The Court has considered the fact that the plaintiff's name has never appeared on any computer-generated list of candidates. Although mindful that information can be supplied in a manner

designed to manipulate and/or to achieve a desired result, the Court concludes that no evidence was presented that any information supplied by supervisors about the plaintiff was inaccurate or misleading or that he was rated on his Civilian Performance and Promotion Appraisal in a manner designed to deny him a promotion or to permit the promotion of less qualified employees."

ARGUMENT AND AUTHORITIES

Petitioner seeks review of this case because the Tenth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

PROPOSITION I

THE APPELLATE COURT MISSTATED NERO'S CONTENTIONS ON APPEAL AND RELIED ON FINDINGS WHICH CONTRA TO THE TRIAL COURT

The appellate court set forth various contentions that appellant allegedly urged on appeal; and, in affirming the decision of the trial court, the appellate court set forth certain findings which are specifically controverted by the trial court or which are unsupported by the evidence in the trial court. (See excerpts from the trial set forth in statement of the case).

First, in its **Order and Judgment**, the appellate court represented inter alia, that:

(1) "...plaintiff argues that the district court erred by requiring him to prove intentional discrimination..."; (2) that the district court refused to admit evidence regarding defendant's "computer profile" system, the method by which the

defendant made promotion determinations...; (3) that the "pretrial order stated that the issue for trial was whether plaintiff had "suffered loss of promotion opportunities" as a result of retaliatory loans..."; and (4) that "the district court improperly "intertwined" his failure to promote issue with his retaliatory loan issue...."

All of the above alleged contentions of Petitioner were either misstatements or taken out of legal and factual context by the appellate court. Further, based on the misstatements of appellant's issues in its **Order and Judgment**, the appellate court made the following findings to affirm the decision rendered by the trial court: "Upon review of the material submitted to this court, we cannot conclude the district court's finding was clearly erroneous...."

Without specifically attacking each and every point of error by the appellate court, most of the errors are

apparent upon comparing the orders of the appellate court and the trial court.

First, Petitioner did not urge that the trial court erred in requiring him to prove intentional discrimination. Indeed, that is a basic tenet of McDonnel Douglas which Petitioner does not contest. Instead, Petitioner represents to this Honorable Court that he urged on appeal, inter alia, that once the trial court found that he had made a prima facie case; and, once the trial court rejected the "business reason" urged by the Air Force, Nero should have been granted judgment as a matter of law.

Nero argued in the alternative that if the trial court accepted the "computer profile" as a "business reason" for his non-promotion, it was error for the trial court to refuse to allow him to cross-

examine the Air Force's witness on that point.

In the appendix submitted to the appellate court, Nero included the portions of the trial transcript where the trial court rejected the "business reason." In fact, the statements of the trial court which are cited in the "Statement of the Case" were taken verbatim from the appendix which Nero submitted to the appellate court.

Next, the appellate court refused to consider Nero's non-promotion argument because the promotion issue was allegedly not stated in the pretrial order and Nero made no allegation that the pretrial order was modified. However, the pretrial order specifically states that "Plaintiff...seeks equitable and monetary relief...including promotion to the

position which he has been denied." Moreover, in its Order of December 12, 1991, the trial court specifically found that the "promotion [was] the ultimate and true relief the plaintiff seeks in this lawsuit." Thus, from the above language, it is clear that the trial court either viewed the promotion issue as properly before it in the first instance, or viewed the pretrial order as amended to conform to the proof.

Finally, with regard to the intertwining issue, the text of the decision by the trial court clearly recognizes that Nero was complaining of three separate issues; discriminatory loans, a discriminatory non-promotion, and discriminatory appraisals. Thus, the findings of the appellate court are completely out of phase with the findings

of the trial court. Again, in his appendix, Nero provided the appellate court with portions of the transcript where the trial court viewed each allegation as separate acts of alleged discriminatory conduct. Thus, notwithstanding the appellate court's conclusion that the material submitted by Nero was inadequate to provide a meaningful review, Petitioner presented his appendix in compliance with Fed. R. App. P. 10 (b)(2).

PROPOSITION II

IN A CASE ALLEGING A DISCRIMINATORY EMPLOYMENT DECISION THE EVIDENCE RELEVANT TO SUCH A FINDING IS EVIDENCE THAT ESTABLISHES A PRIMA FACIE CASE, EVIDENCE THAT ESTABLISHES THE BUSINESS REASON FOR THE CHALLENGED ACTION AND THE EVIDENCE WHICH ESTABLISHES THAT THE BUSINESS REASON IS PRETEXT

Under Fed.R.App.R., rule 10(b)(2), 28 U.S.C., an appellant is charged with providing the appellate court with a

suitable record on appeal:

> If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.

To this end, Nero included each of the above findings by the trial judge in his appendix. Nero also included those portions of the trial transcript that spoke the three prong McDonnel Douglas scheme of proof--prima facie- rebuttal-pretext.

Specifically, Nero included the portions of trial testimony of each of his witnesses which spoke to Nero's qualifications and the qualifications of the comparatives who were promoted; the selection process; and Nero's ultimate non-promotion. Also, Nero included the portions of the testimony of the

witnesses called by the Air Force which spoke to Nero's qualifications and the qualifications of the comparatives who were promoted; the selection process, and his ultimate non-promotion. Likewise, Nero's appendix included testimony of all the Air Force's witnesses who testified about its "business reason" for Nero's non-promotion. The trial court wholly rejected the Air Forces "business reason" in its "garbage-in-garbage-out" pronouncement; and Nero met his burden of proof under the third prong of the McDonnell Douglas standard of proof. Accordingly, Nero prevailed as a matter of law.

PROPOSITION III

UNDER RULE 30 OF THE FEDERAL RULES OF APPELLATE PROCEDURE "THE ENTIRE RECORD IS ALWAYS AVAILABLE TO THE COURT FOR REFERENCE" AND IT WAS A GROSS ABUSE OF DISCRETION FOR THE APPELLATE COURT TO DENY NERO THE

OPPORTUNITY TO SUPPLEMENT RECORD

The Tenth Circuit Court of Appeals has long since acknowledged that to assure a meaningful review it has the ability to request any documents or transcripts from the district court which it deems necessary for review. See Doyn Aircraft, Inc. v. Wylie, 443 F.2d 579, 584 (10th Cir. 1971).

In this case, as set forth in Propositions I and II, Nero supplied the appeals court with all the evidence relevant to his claim of discriminatory non-promotion. Notwithstanding, the appeals court deemed Nero's appendix and the portions of the transcript insufficient for review of the decision of the trail court. Yet the appeals court did not allow Nero the opportunity to supplement the record when he

requested oral argument for that purpose; however, sister circuits have allowed precisely such supplementation. See Rodriguez v. Anderson, 973 F.2d 550 (7th Cir. 1992); Garnes v. Gulf & Western Mfg. Co., 789 F.2d 637 (8th Cir. 1986). Nor did the court allow Nero to supplement his record in support of his petition for rehearing. Nero submits that in order to do substantial justice in this case, the Appeals court had a duty to: (1) order that the district court send up the entire transcript or (2) allow Nero to supplement the record with the entire transcript.

Again, there is nothing novel about such a practice. In Garnes, supra, the Eight Circuit confronted a similar issue and reasoned:

If Gulf & Western deemed a partial transcript sufficient for this purpose,

it had a duty to file and serve on Garnes a statement of the issues it intended to present on appeal and a copy of its order of a partial transcript...That was, Garnes could have ordered additional parts of the transcript if he though the partial transcript ordered by Gulf & Western was inadequate.

After oral argument, we asked Gulf & Western for, and received, an entire transcript of the trial. After reviewing the transcript, we see that the partial transcript originally provided by Gulf & Western included essentially all of the relevant evidence....

Garnes v. Gulf & Western Mfg. Co, 789 F.2d at 640, note 3.

In this case, the entire transcript was available to the reviewing court and there was no reason for the court of appeals to refuse to avail itself of the entire transcript, either by its own motion or by allowing supplementation by Nero. Nero submits that in order to give meaning to the notion that "the parties shall have regard for the fact that the entire record is always available for

reference and examination" this Court must pronounce a uniform standard to which the courts of appeals must conform.

CONCLUSION AND PRAYER FOR RELIEF

Wherefore premises considered, Petitioner respectfully prays that this Honorable Court grant his Petition for Writ of Certiorari and thereafter reverse the decision of the Court of Appeals for the Tenth Circuit. Petitioner further prays that this Honorable Court grant him the costs of this Petition and a reasonable attorney fee.

Respectfully submitted,

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APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

DONALD NERO,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. CIV-90-630-W
	)	
DONALD B. RICE, Secretary, of the Air Force, and UNITED STATES OF AMERICA,	)	
	)	
Defendants.	)	

J U D G M E N T

Having dismissed the plaintiff's cause of action against the defendant, United States of America, and having tried the plaintiff's remaining cause of action against the defendant, Donald B. Rice, Secretary, United States Department of the Air Force, and having entered Findings of Fact and Conclusions of Law on the latter cause of action, the Court

hereby ORDERS and ADJUDGES that judgment be entered in favor of the defendant, Donald B. Rice, Secretary, United States Department of the Air Force, and against the plaintiff, Donald Nero.

Dated at Oklahoma City, Oklahoma, this 12th day of December, 1991.

LEE R. WEST
UNITED STATES DISTRICT JUDGE

ENTERED ON JUDGMENT DOCKET ON 12-12-91

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

DONALD NERO	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. CIV-90-630-W
	)	
DONALD B. RICE, Secretary, of the Air Force, and UNITED STATES OF AMERICA,	)	FILED DEC 12 91 Robert D. Dennis Clerk, U.S. District Court Western District of Oklahoma
Defendants.	)	

BY DEPUTY

ORDER

This matter came on for trial before the Court sitting without a jury on the plaintiff's claim in his amended complaint[1] that he was the victim of

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[1] In his amended complaint filed January 22, 1991, the plaintiff sought relief against defendants Donald B. Rice, Secretary, Department of the Air Force, and the United States of America. The plaintiff advanced causes of action under Title VII against defendant Rice for discriminatory conduct and under the Federal Tort Claims Act (FCTA) against the United States for intentional

adverse employment actions in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. Having heard the testimony of the witnesses and having reviewed the parties' documentary evidence, the Court makes the following factual findings and draws the following legal conclusions therefrom.[2]

Findings of Fact

1. The plaintiff, Donald Nero, is

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infliction of emotional distress. On June 10, 1991, the Court upon motion dismissed the United States as a party defendant on the ground that the plaintiff's exclusive remedy under these circumstances was Title VII. E.g., Hatcher-Capers v. Haley, 773 F.Supp. 486 (D.D.C. 1991) (when same facts give rise to both Title VII claim and FTCA claim, latter cause of action cannot be pursued).

[2] In so doing, the Court hereby denies the defendant's oral motion made at the close of the plaintiff's case-in-chief pursuant to Rule 41(b), F.R.Civ.P.

a black male who has been employed at Tinker Air Force Base (Tinker), Oklahoma, for eleven years. Since April 1987, the plaintiff has been employed as a preservation packer, WG-7004-06, in the Transportation Operations Division (DSTEPB), Directorate of Distribution. Immediately prior to this assignment, the plaintiff was employed as a packer, WG-7002-06, in the Central Packing Section (DSTEP).

2. The defendant is Donald B. Rice, Secretary, United States Department of the Air Force.

3. During the time of the allegedly adverse employment actions, the plaintiff was under the supervision of among others, Section Chief Melton Moran (now Chief, Packing and Preservation Branch), a white male, and Unit Chief,

Central Packing Section, Norma Welch (now Chief, Central Packing Section), a white female.

4. On September 29, 1985, the plaintiff was promoted temporarily to the position of supervisor (Packer Foreman). This promotion and the corresponding increase in grade and pay terminated automatically after 120 days. The plaintiff nevertheless continued thereafter to serve as a supervisor without any increase in grade or pay when supervisors were absent.

5. In fact, on September 18, 1986, Mr. Moran issued the plaintiff a Letter of Appreciation wherein Mr. Moran wrote that he "would like to express [his] appreciation for the hard work and leadership support" the plaintiff had provided. Mr. Moran commended the

plaintiff on his attitude and wrote further that although the plaintiff's temporary promotion to supervisor had expired in January 1986, the plaintiff had

> "willingly continued to substitute for absent supervisors, to the extent of changing . . . days off, shifts, and even buildings in order to accomplish the mission."

6. The evidence demonstrated that the rating official, Ms. Welch, in completing the Civilian Performance and Promotion Appraisal dated February 17, 1987, which evaluated the plaintiff's performance from February 1, 1986, to January 31, 1987, took into consideration the plaintiff's talents as a supervisor. The evidence demonstrated further that the plaintiff's "supervisory efforts when performed were professional and

effective," but that his performance as a packer was only average. Ms. Welch testified that the rating score of 68 and the corresponding achievement level, "fully satisfactory," were obtained only because the plaintiff's performance as a temporary supervisor had been considered.[3]

7. The score received on this appraisal was equal to the score received on the preceding appraisal, the evaluation period for which was February 1, 1985, to January 31, 1986. Ms. Welch

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[3] In two "periodic performance reviews" conducted by Ms. Welch on April 17, 1986, and September 9, 1986, during this same appraisal cycle, Ms. Welch noted that the plaintiff had served as "acting supervisor" whenever the need arose, that he met or exceeded all elements and standards of his work plan and that he averaged 25 line items. See AFLC-AFGE Master Labor Agreement Art. 15, § 15.02(f) (authorizing periodic review during appraisal cycle).

was likewise the rating official for this appraisal cycle and these two scores exceeded all earlier scores received by the plaintiff. See Civilian Performance and Promotion Appraisal signed by plaintiff on February 21, 1985 (plaintiff received 56 points for evaluation period, July 1, 1984, to January 31, 1985).

8. During the February 1986 to January 1987 appraisal period, 14 white females, 23 white males, 4 black females, 11 black males, 1 Hispanic female and 2 Hispanic males were rated by Ms. Welch. The plaintiff was rated higher than 26 white employees, 13 black employees and 3 Hispanic employees.

9. On September 30, 1986, the plaintiff received an Administrative Notice signed by Mr. Moran. He was advised that two female employees had

charged him with sexual harassment and that he would remain under Administrative Notice until the matter had been investigated and resolved.

10. In December 1986, a Notice of Proposed Reprimand was issued and the plaintiff was charged with disruptive behavior. The inappropriate behavior was making unsolicited and offensive statements of a sexual nature toward female employes and interfering with the production of others.

11. On January 6, 1987, the plaintiff contacted Evelyn Nephew, an Equal Employment Opportunity (EEO) counselor, and both signed a sworn statement that read in part:

(a) that the plaintiff had been a packer for seven years;

(b) that the plaintiff believed that the Notice of Proposed Reprimand was discriminatorily

motivated because of the plaintiff's race and sex; and

(c) that the Notice was intended to hinder the plaintiff in his efforts to be promoted to permanent supervisor.

The plaintiff requested that the proposed reprimand be rescinded and that he be promoted to Packer Foreman.

12. On January 7, 1987, Ms. Nephew completed a Counselor's Daily Contact Summary wherein she memorialized the fact that the plaintiff had contacted an EEO counselor.

13. On January 14, 1987, Mr. Moran issued a Notice of Decision to Reprimand after he concluded that the evidence supported and warranted the proposed reprimand.

14. This action prompted the plaintiff to amend his sworn statement on January 22, 1987. This amendment was

likewise signed by Ms. Nephew. The plaintiff repeated his allegation of discrimination and his requests that the disciplinary action be rescinded and that he be promoted to Packer Foreman. This contact was also memorialized in a Counselor's Daily Contact Summary.

15. On February 9, 1987, the plaintiff was notified of a final counseling interview by the EEO counselor and he was advised that he had the right to file a complaint of discrimination with the EEO Complaints Activity Officer within fifteen calendar days. No complaint was filed by the plaintiff within that fifteen-day period.

16. From December 1986 to June 1987, the plaintiff was "loaned" by his supervisors three times for varying

periods of time.[4] The first "loan" occurred on January 15, 1987, nine days after his first contact with Ms. Nephew and one day after the Notice of Decision to Reprimand was issued. The third "loan" was in fact a reassignment to Building 510, where the plaintiff is now employed, as stated, as a preservation

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[4] AFLC-AFGE Master Labor Agreement Art. 21, § 21.01 defines a "loan" as

> "the assignment of an employee to another supervisor or organization to meet temporary or limited emergency work situations where the position has the same grade, series, and basic duties as his/her regularly assigned position."

The duration of a "loan" is to

> "be limited to the shortest practicable time and, upon request, the Employer will inform the employee of the anticipated duration and working conditions which are different at the receiving location."

packer, WG-7004-06 (DSTEPB).

17. During this same period, three other employees, 3 black males and 1 white female, were also "loaned" from Building 506 to other work stations.

18. When notified of the need to "loan" an employee due to increased workload in another building, supervisors polled employees seeking volunteers. A "loans" roster was used and each employee on the roster was approached in the order the employee's name appeared on the roster until a volunteer was found. If no employee volunteered, an employee whose name was on the "loans" roster was selected.

19. On June 10, 1987, the plaintiff met again with Ms. Nephew. He swore in a written statement, dated with that date and signed by Ms. Nephew,

(a) that the frequent "loans" were because he was a black male and in retaliation for previous EEO activity; and

(b) that during these "loans," a white male employee and a white female employee were promoted to permanent supervisor positions.[5]

20. He also took issue in that statement with his Civilian Performance and Promotion Appriasal dated February 17, 1987, wherein Ms. Welch had given the plaintiff a score of 68 and rated his

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[5] There are apparently three promotions of co-workers about which the plaintiff has complained: Charles Cutting on October 13, 1985, Sheri Vann Wiley on November 11, 1986, and Barbara McCurdy in June 1987. Testimony indicated that a "profile" is prepared to fill vacancies and to make promotions. A list of approximately ten candidates is computer-generated after compilation of objective factors such as experience, training and education and subjective factors such as appraisal scores. Disciplinary action information is not a factor that is used in preparing the lists. It is undisputed that the plaintiff's name has not appeared on any list of candidates.

performance as "fully satisfactory." The plaintiff on February 19, 1987, was given the opportunity to sign the appraisal but he refused to do so on the ground that he had been improperly evaluated. In this written statement he again requested a promotion to permanent supervisor and reevaluation.

21. On July 1, 1987, the plaintiff filed a formal Complain of Discrimination wherein he described the alleged discriminatory employment action as follows:

> "During the months 14 Jan., 87 thru 3 Jun., 87 I was continuosly [sic] loaned out to other work areas, and other employees are not loaned out as frequent. This prevented me from promotions and being fairly rated on my work performance appraisal."

He likewise requested in this formal complaint a promotion and reevaluation.

22. On July 15, 1987, Johnnie Cash, Jr., director of the EEO Complaints Office and Chief EEO counselor, submitted a written request to the Department of the Air Force for an investigator. The Statement of Accepted Issue which Mr. Cash submitted in his request read:

> "Was Mr. Donald L. Nero discriminated against due to his race (Black), sex (Male) and a victim of reprisal for previous EEO activity when on 3 Jun 87 he was loaned from building 18 (DSTEAB) Unit to building 510 (DSTEP) Unit while Caucasian males and females were not loaned as he was loaned?"

23. On August 20, 1987, Aletha Tarington, also an employee in the Tinker EEO Complaints office, submitted the following revision to Mr. Cash's Statement of Accepted Issue:

> "1. The attached Case File was submitted for Air Force Investigation in error. Review of the FIle indicates the issue

identified requires restatement and that the issue of the 1987 Civilian Performance and Promotion Appraisal (CPPA) was inadvertently omitted from processing this formal concern.

"2. Two issues have been identified:

(1) Was Mr Donald Nero discriminated against due to his race (Black), sex (male) and a victim of reprisal for previous EEO activity when he was loaned from his officially assigned work station in OC-ALC/DSTEA (Bldg 506) during the period 15 January 1987 to 3 June 1987 when Caucasian co-workers were allegedly not loaned?

(2) Was Mr Donald Nero discriminated against due to his race (Black), sex (male) and a victim of reprisal for previous EEO activity when on 19 February 1987 he was issued his Civilian Performance and Promotion Appraisal (CPPA)?

"Initial Contact with an EEO Counselor concerning both issues was 10 June 1987."

24. On September 15, 1987, plaintiff Nero was advised in writing by the Department of the Air Force that only the first issue was accepted for investigation. The second issue was rejected as untimely. The plaintiff was advised that Air Force Regulation 40-1613, paragraph 2-4f, requires an allegation of discrimination to be brought to the attention of an EEO counselor within thirty (30) days after the incident about which the complaint is made. The incident described in the second issue occurred at the latest on February 19, 1987, the date the plaintiff refused to sign the Civilian Performance and Promotion Appraisal. Thus, contact with the EEO counselor on June 10, 1987, was deemed untimely.

25. The plaintiff was also advised

on September 15, 1987, that he had the right to appeal this decision of acceptability to the EEO Commission or file a lawsuit in federal court. Neither action was taken by the plaintiff at that time.

26. On February 11, 1988, the plaintiff injured his arm at work. Upon returning some eight months later, the plaintiff reinjured his arm on two occasions. At trial, the plaintiff complained that these injuries resulted because Mr. Moran and Ms. Welch assigned the plaintiff tasks he was physically incapable of performing. Notwithstanding such allegations, the Court finds no evidence to support this contention or the plaintiff's argument that the plaintiff's assigned tasks were discriminatorily motivated. Rather, the

evidence including the plaintiff's own testimony demonstrated that the plaintiff was permitted during this time to work on "light duty."

27. On April 27, 1989, the Air Force EEO Complaints Investigator assigned to the plaintiff's case issued her report. She found that legitimate, nondiscriminatory reasons existed for loaning the plaintiff to other work areas and that these reasons were not pretextual and did not mask any prohibited discriminatory or reprisal activity.

28. At the plaintiff's request this report was reviewed by William P. Bowden, Major General, United States Air Force, Commander. On May 26, 1989, Commander Bowen issued a Notice of Proposed Disposition wherein he wrote that he

found no evidence that race or previous participation in any protected activity was an influencing factor in the plaintiff's loans to other work stations. The plaintiff thereafter requested a hearing.

29. That request was withdrawn on August 15, 1989, and on November 28, 1989, a Final Agency Decision issued wherein Commander Bowden's conclusions and proposed disposition were adopted.

30. The plaintiff then chose to appeal to the Office of Review and Appeals regarding the framing of the issue and on December 19, 1989, he gave notice that he wished to appeal the Final Agency Decision.

31. In his brief submitted in support of his appeal, the plaintiff challenged restatement of the issues

presented in his complaint of July 1, 1987, by the EEO Complaints Office. In particular, he argued that the restatement did not address adequately his contentions regarding the connection between the loans and what he perceived to be the consequences thereof: allegedly unfair evaluations and ultimately, nonpromotion.

32. On March 14, 1990, the Office of Review and Appeals denied the plaintiff's appeal as untimely.

Conclusions of Law

1. The Court has jurisdiction over this action pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16, the statute under which the action arose.

2. Donald Rice, Secretary, Department of the Air Force, is the

proper party defendant. Id. (in civil action, head of department/agency shall be defendant).

3. Section 2000e-16(a) provides that

> "[a]ll personnel action . . . shall be made free from any discrimination based on race . . . ."

Retaliation against an employee who has challenged an allegedly unlawful employment practice under Title VII is also recognized as a form of discrimination under Title VII. E.g., Shamey v. Administrator, General Services Administration, 732 F.Supp, 122 (D.D.C. 1990); 42 U.S.C. § 2000e-3.

4. This lawsuit involves allegations of discriminatory treatment against the plaintiff. Discriminatory treatment occurs where an employer simply treats an employee less favorable than

other employees because of the employee's race or participation in statutorily-protected activity.

5. In the instant case, the plaintiff has contended that he has not been promoted and has received unfair evaluations because he was the victim of discriminatory "loan" practice. The plaintiff has contended that he was "loaned" because he is black and in retaliation for his having filed charges and complaints with the EEO counselor.

6. When alleging disparate treatment, a plaintiff must prove by a preponderance of the evidence that his employer had a discriminatory motive or intent. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988). This is usually done by "a series of shifting evidentiary burdens that are 'intended

progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.'" Id. (quoting Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 255 n.8 (1981). "[T]hese shifting burdens are meant only to aid courts and litigants in arranging the presentation of evidence: 'The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'" Id. (quoting Burdine, 450 U.S. at 253). Thus, as in the instant case, when the case is fully tried, the Court need consider only the ultimate question; the subsidiary steps in the proof scheme become irrelevant. Ortega v. Safeway Stores, Inc., 943 F.2d 1230, 1237 (10th Cir. 1991) (citing United

States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715 (1983)).

7. The Court has first examined the plaintiff's complaint that he was unfairly "loaned" to other work stations. The Court has found no evidence that these "loans" resulted from any discriminatory motive. Instead, the evidence demonstrates that employees, including the plaintiff, either volunteered or were selected from a "loans" roster to work in different locations in response to increased workloads and to accomplish missions. There is no credible evidence that the plaintiff was selected for any "loan" assignment or reassigned because he is black or because he contacted Ms. Nephew in January 1987.

8. The Court concludes further

that there was no evidence presented that the plaintiff received an unfair evaluation in February 1987 either because of these "loans," because he is black or because he engaged in a statutorily protected activity. Rather, in the Civilian Performance and Promotion Appraisal that the plaintiff refused to sign and that is the subject of his amended complaint, the plaintiff received a score equal to or higher than any previous score he had received.

9. The Court has also considered whether what has now been determined to be a neutral action--the "loans"--nevertheless had the effect of being discriminatory by denying the plaintiff the opportunity to be promoted. First, two of the three promotions about which the plaintiff has complained were given

to members of a protected group: Barbara McCurdy (female) and Sheri Vann Wiley (black female). Second, two of the promotions--the ones received by Charles Cutting and Sheri Vann Wiley--occurred prior to the "loans" about which the plaintiff has complained and prior to any contact by the plaintiff with the EEO counselor.

10. The Court has considered the fact that the plaintiff's name has never appeared on any computer-generated list of candidates. Although mindful that information can be supplied in a manner designed to manipulate and/or to achieve a desired resut, the Court concludes that no evidence was presented that any information supplied by the supervisors about the plaintiff was inaccurate or misleading or that he was rated on his

Civilian Performance and Promotion Appraisal in a manner designed to deny him a protion or to permit the promotion of less qualified employees.

11. Even assuming that some or all of the plaintiff's supervisors may have misdjudged the plaintiff's skills as a packer and/or as a permanent supervisor, such an error in judgment alone does not expose an employer to liablilty under Title VII. Title VII provides redress only when an employment decison is based upon unlawful criteria.

12. Various agruments have been advanced by the defendant regarding the timliness of the plaintiff's statements, charges and complaints, both informal and forma. The Court has concluded that resoluton of the merits of the plaitniff's claims of discrimination is

more appropriate in these circumstances because each contact with an EEO counselor and each statement and charge, informal adn formal, submitted by the plaintiff requested promotion, which is the ultimate and true relief the plaintiff seeks in this lawsuit. Unable to ascertain or recognize the reason for his nonpromotion to a permanent supervisor's position, the plaintiff has viewed every decision, adverse or otherwise, by a supervisor as discriminatory.

13. Based upon the foregoing, the Court concludes that there is no causal connection between any "loan" adn the plaintiff's race or participation in EEO activity and no evidence to support a finding that hte plaintiff was treated differently with regard to "loans,"

appraisals or promotions because of his race or because he engaged in statutorily protected activity. Accordingly, the Court finds that the plaintiff has failed to prove that he was the victim of intentional discrimination or retaliation. Judgment in favor of defendant shall issue forthwith.

ENTERED this 12th day of December, 1991.

/S/
LEE R. WEST
UNITED STATES DISTRICT JUDGE

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DONALD NERO,	)	
	)	
Plaintiff-Appellant,	)	No. 92-6100
	)	(D.C. No.
v.	)	CIV-90-630-
	)	W) (W.D.
DONALD B. RICE, Secretary, Department of the Air Force; UNITED STATES OF AMERICA,	)	Okla.)
	)	
Defendants-Appellees.	)	

ORDER AND JUDGMENT*[1]

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[1]* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3

*** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See. Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Before TACHA and BALDOCK, CIRCUIT JUDGES, and BROWN,** Senior District Judge.***

**Honorable Wesley E. Brown, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

Plaintiff-appellant Donald Nero appeals from an order of the district court entering judgment for defendants. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

Plaintiff, a black male civilian Air Force employee, commenced this action pursuant to Title VII, 42 U.S.C. § 2000e-16, and the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671-2680. The district court granted defendants' motion for partial summary judgment and dismissed plaintiff's FTCA claim on the ground that plaintiff's exclusive remedy for claims of discrimination in federal

employment was provided by Title VII. Following a bench trial, the court held that plaintiff had failed to prove he was the victim of intentional discrimination or retaliation and entered judgment for defendants on plaintiff's Title VII claims.

On appeal, plaintiff argues the district court erred by requiring him to prove intentional discrimination. Plaintiff contends that the court should have applied the burden-shifting format of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and required defendant to show its proffered reasons were legitimate.

While the McDonnell Douglas format is intended for analyzing Title VII claims, once the defendant has set forth a facially nondiscriminatory reason for its actions, "the plaintiff then assumes

the normal burden of any plaintiff to prove his or her case at trial." EEOC v. Flasher Co., 1992 WL 384935 at *3 (10th Cir. Dec. 29, 1992). The court must weigh the evidence presented and assess the credibility of witnesses "to determine whether the plaintiff was the victim of intentional discrimination based upon protected class characteristics." Id. A plaintiff can meet his burden either directly by proving the employer acted with a discriminatory motive or indirectly by showing that the employer's stated reason for its action was pretextual.

The district court's determination of whether plaintiff met his burden is an issue of fact which we review under the clearly erroneous standard. Flasher, at *3. Upon review of the materials submitted to this court, we cannot

conclude the district court's finding was clearly erroneous. [2]

Plaintiff argues specifically that at trial the district court refused to admit evidence regarding defendant's "computer profile" system, the method by which defendant made promotion determinations. The court allegedly refused to accept the absence of plaintiff's name on the computer generated promotion eligibility list as a legitimate business reason for not promoting plaintiff. Plaintiff argues that in its order, however, the court

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[2] Our review of this issue is necessarily limited. In his appendix, plaintiff included only brief, unidentified excerpts of the transcript. For us to determine whether a district court's findings were clearly erroneous, plaintiff must include in the record a transcript of all evidence, properly identified, which is relevant to such findings. See Fed. R. App. P. 10(b)(2); Deines v. Vermeer Mfg. Co., 969 F.2d 977, 979 (10th Cir. 1992).

relied on the computer profile as the basis for its decision.

The pretrial order stated that the issue for trial was whether plaintiff had "suffered loss of promotion opportunities" as a result of retaliatory loans. Appellant's App. at 128-29. Pretrial orders control the course of the action unless later modified. Fed. R. Civ. P. 16(e). Plaintiff has not alleged that the pretrial order was modified.

The district court found no evidence that the loans were made for discriminatory reasons. Id. at 155-56. As noted, supra, plaintiff has failed to include a sufficient record to permit adequate review. However, the fact that plaintiff's name was not on the promotion eligibility list does not appear to bear on the central determination of whether plaintiff was

loaned to other departments for discriminatory reasons. We cannot hold that he district court erred in its determination.

Plaintiff argues that oral argument is necessary because the facts and legal arguments need to be supplemented. The purpose of oral argument is not to supplement an inadequate record.

Plaintiff argues the district court improperly "intertwined" his failure to promote issue with his retaliatory loan issue. The materials submitted to us contain no indication plaintiff requested that his failure to promote be considered independently after the pretrial order was entered. Cf. Hullman v. Board of Trustees of Pratt Community College, 950 F.2d 665, 667 (10th Cir. 1991). The court committed no error.

Plaintiff also argues the district

court erred by considering the administrative record and making findings of fact based on that record. While enumerating the findings allegedly derived from the administrative record, plaintiff has not identified any errors contained therein. We cannot say that the district court committed reversible error.

Finally, plaintiff argues his FTCA claim should not have been dismissed because it was not related to his discrimination claims. Title VII provides "the exclusive judicial remedy for claims of discrimination in federal employment." Brown v. General Servs. Admin., 425 U.S. 820, 835 (1976). Title VII does not, however, preclude separate remedies for unconstitutional actions such as torts of highly personal violations other than discrimination.

Otto v. Heckler, 781 F.2d 754, 756-57 (9th Cir.), amended, 802 F. 2d 337 (1986).

Both to the agency and to the district court, plaintiff framed his FTCA claim as alleging intentional infliction of emotional distress due to defendant's discriminatory actions of loaning him to other departments and denying him a promotion. This claim is clearly grounded in his Title VII employment discrimination claims and could not have been brought separately.[3]

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[3] On appeal, plaintiff appears to argue his FTCA claim is based on his supervisor's tortious conduct of insisting he perform work for which he was not medically cleared and, in one instance refusing to approve medical treatment for him for four months. Plaintiff contends that, as a result, he has lost the use of one arm. Arguably, plaintiff could bring this claim under the FTCA. However, plaintiff did not exhaust his administrative remedies and cannot bring this claim inn federal court. See 28 U.S.C.§ 2675.

The judgment of the United States District Court for the Western District of Oklahoma is AFFIRMED.

Entered for the Court

Bobby R. Baldock
Circuit Judge

APPENDIX "D"

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DONALD NERO,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 92-6100
	)	
DONALD B. RICE, Secretary, Department of the Air Force; UNITED STATES OF AMERICA,	)	
	)	
Defendants-Appellees.	)	

ORDER
Entered March 30, 1993

Before TACHA and BALDOCK, Circuit Judges and BROWN, * District Judge.

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*The Honorable Wesley E. Brown of the States District Court for the District of Kansas, sitting by designation.

This matter comes on for consideration of appellant's petition for rehearing and motion to file a

supplemental appendix.

Upon consideration whereof, the petition for rehearing and the motion to file supplemental appendix are denied.

Entered for the Court
Robert L. Hoecker, Clerk

By Patrick Fisher
Chief Deputy Clerk

APPENDIX "E"

FEDERAL RULE OF APPELLATE PROCEDURE 10, The record on appeal

(a) Composition of the record on appeal. -- The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.

(b) The transcript of proceedings; duty of the appellant to order; notice to appellee if partial transcript is ordered. -- (1) Within 10 days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as the appellant deems necessary, subject to local rules of the courts of appeals. The order shall be in writing and within

the same period a copy shall be filed with the clerk of the district court. If funding is to come from the United States under the Criminal Justice Act, the order shall so state. If no such parts of the proceedings are to be ordered, within the same period the appellant shall file a certificate to that effect.

(2) If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such a finding or conclusion.

10th Cir. R. 10.1 Transcripts.

10.1.1 Appropriate transcripts.-- It is the appellant's responsibility to order and provide all portions of the transcript necessary to give the court of appeals a complete and accurate record of the proceedings insofar as such proceedings relate to the issues raised in appeal, and when sufficiency of the evidence is raised, the entire trial transcript ordinarily should be provided. However, there will be other occasions when a transcript is unnecessary for resolution of the issues raised, or when a partial transcript is sufficient. In those instances only the relevant portions, if any, of the transcript should be ordered and provided. Counsel should endeavor to enter into stipulations that will avoid or reduce transcripts. Transcripts should omit the

examination of jurors unless specifically drawn into issue on appeal. If no transcript is to be ordered, the appellant shall file a certification to that effect in this court within 10 days of filing the notice of appeal, and shall serve a copy of the certification on the appellee and the district court clerk.

APPENDIX "F"

FEDERAL RULE OF APPELLATE PROCEDURE 30, Appendix to the briefs

(a) Duty of appellant to prepare and file; content of appendix; time for filing; number of copies. --The appellant shall prepare and file an appendix to the briefs which shall contain: (1) the relevant docket entries in the proceeding below; (2) any relevant portions of the pleadings, charge, findings or opinion; (3) the judgment, order or decision in question; and (4) any other parts of the record to which the parties wish to direct the particular attention of the court. Except where they have independent relevance, memoranda of law in the district court should not be included in the appendix. The fact that parts of the record are not included in the appendix shall not prevent the

parties or the court from relying on such parts.

Unless filing is to be deferred pursuant to the provisions of subdivision (c) of this rule, the appellant shall serve and file the appendix with the brief. Ten copies of the appendix shall be filed with the clerk, and one copy shall be served on counsel for each party separately represented, unless the court shall by rule or order direct the filing or service of a lesser number.

(b) Determination of contents of appendix; cost of producing. --The parties are encouraged to agree as to the contents of the appendix. In the absence of agreement, the appellant shall, not later than 10 days after the date on which the record is filed, serve on the appellee a designation of the parts of the record which the appellant

intends to include in the appendix and a statement of the issues which the appellant intends to present for review. If the appellee deems it necessary to direct the particular attention of the court to parts of the record not designated by the appellant, the appellee shall, within 10 days after receipt of the designation, serve upon the appellant a designation of those parts. The appellant shall include in the appendix the parts thus designated with respect to the appeal and any cross appeal. In designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is always available to the court for reference and examination and shall not engage in unnecessary designation. The provisions of this paragraph shall apply to cross

appellants and cross appellees.

Unless the parties otherwise agree, the cost of producing the appendix shall initially be paid by the appellant, but if the appellant considers that parts of the record designated by the appellee for inclusion are unnecessary for the determination of the issues presented the appellant may so advise the appellee and the appellee shall advance the cost of including such parts. The cost of producing the appendix shall be taxed as costs in the case, but if either party shall cause matters to be included in the appendix unnecessarily the court may impose the cost of producing such parts on the party. Each circuit shall provide by local rule for the imposition of sanctions against attorneys who unreasonably and vexatiously increase the costs of litigation through the inclusion

of unnecessary material in the appendix.

(c) Alternative method of designating contents of the appendix; how references to the record may be made in the briefs when alternative method is used.--If the court shall so provide by rule for classes of cases or by order in specific cases, preparation of the appendix may be deferred until after the briefs have been filed, and the appendix may be filed 21 days after service of the brief of the appellee. If the preparation and filing of the appendix is thus deferred, the provisions of subdivision (b) of this Rule 30 shall apply, except that the designations referred to therein shall be made by each party at the time each brief is served, and a statement of the issues presented shall be unnecessary.

If the deferred appendix authorized

by this subdivision is employed, references in the briefs to the record may be to the pages of the parts of the record involved, in which event the original paging of each part of the record shall be indicated in the appendix by placing in brackets the number of each page at the place in the appendix where that page begins. Or if a party desires to refer in a brief directly to pages of the appendix, that party may serve and file typewritten or page proof copies of the brief within the time required by Rule 31(a), with the appropriate references to the pages of the parts of the record involved. In that event, within 14 days after the appendix is filed the party shall serve and file copies of the brief in the form prescribed by Rule 32(a) containing references to the pages of the appendix

in place of or in addition to the initial references to the pages of the parts of the record involved. In that event, within 11 days after the appendix is filed the party shall serve and file copies of the brief in the form prescribed by Rule 32(a) containing references to the page of the appendix in place of or in addition to the initial references to the parts of the record involved. No other changes may be made in the brief as initially served and filed, except that typographical error may be corrected.

(d) Arrangement of the appendix.-- At the beginning of the appendix there shall be inserted a list of the parts of the record which it contains, in the order in which the parts are set out therein, with references to the pages of the appendix at which each part begins.

The relevant docket entries shall be set out following the list of contents. Thereafter, other parts of the record shall be set out in chronological order. When matter contained in the reporter's transcript of proceedings is set out in the appendix, the page of the transcript at which such matter may be found shall be indicated in brackets immediately before the matter which is set out. Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial formal matters (captions, subscriptions, acknowledgements, etc.) shall be omitted. A question and its answer may be contained in a single paragraph.

(e) Reproduction of exhibits.-- Exhibits designated for inclusion in the appendix may be contained in a separate volume, or volumes, suitably indexed.

Four copies thereof shall be filed with the appendix and one copy shall be served on counsel for each party separately represented. The transcript of a proceeding before an administrative agency, board, commission or officer used in an action in the district court shall be regarded as an exhibit for the purpose of this subdivision.

(f) Hearing of appeals on the original record without the necessity of an appendix.--A court of appeals may by rule applicable to all cases, or to classes of cases, or by order in specific cases, dispense with the requirement of an appendix and permit appeals to be heard on the original record, with such copies of the record, or relevant parts thereof, as the court may require.

10th Cir. R. 30.1 Appellant's Appendix. --In all appeals from a district court, except pro se appeals and appeals in which a party is represented by an attorney appointed under the Criminal Justice Act, the record on appeal will be retained in the district court. Appellant must file an appendix to appellant's opening brief, containing excerpts of the record.

30.1.1 Contents of Appellant's Appendix. --Those inclusionary and exclusionary requirements applicable to a record on appeal --see 10th Cir. R. 10.3 -- are equally applicable to appellant's appendix. It is the responsibility of the appellant's counsel to file an appendix sufficient for consideration and determination of the issues on appeal. See particularly 10th Cir. R. 10.1.1

pertaining to adequate transcripts. The court is under no obligation to remedy any failure of counsel to fulfill that responsibility.

10th Cir. R. 30.2 Supplemental Appendix.--If the appellee believes that appellant's appendix omits items which should be included, appellee may file a supplemental appendix with the appellee's answer brief. No other appendix may be filed express by express order of the court. A supplemental appendix must be in the same form as appellant's appendix and shall be filed and served in the same manner.